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**IN THE  
COURT OF APPEALS OF INDIANA**

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TOMMY L. CLARY,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 48A02-0512-CV-1146
	)	
PATRICIA E. CLARY,	)	
	)	
Appellee-Petitioner.	)	

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APPEAL FROM THE MADISON SUPERIOR COURT NO. 2  
The Honorable Jack L. Brinkman, Judge  
Cause No. 48D02-0311-DR-1083

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**December 29, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**SULLIVAN, Judge**

Appellant, Tommy Clary (“Husband”), challenges the trial court’s dissolution decree dissolving his marriage to Appellee, Patricia Clary (“Wife”). Upon appeal, Husband presents one issue for our review: whether the trial court abused its discretion in dividing the marital estate.

We affirm.

Husband and Wife were married in February of 1992, and there were no children born to the marriage. On October 2, 2003, Wife filed a petition for dissolution. The final hearing for the dissolution was conducted over the course of three separate days, May 24, 2004, and August 17 and 18, 2005. On November 7, 2005, the trial court issued findings of fact and conclusions of law which it incorporated into the decree of dissolution entered that same day.

With respect to the marital estate, the trial court awarded Wife the following marital assets, subject to the indebtedness thereon: (a) the marital residence; (b) a Comprehensive Financial Group IRA;<sup>1</sup> (c) any and all retirement accounts including but not limited to 401(k), profit sharing, or pensions in her name; (d) 19.09% of Husband’s pension from General Motors<sup>2</sup> by Qualified Domestic Relations Order; (e) her life insurance through Swain Agency State Farm with a cash value of \$1,567; (f) a 1996 Dodge Intrepid; (g) a 1999 Nomad trailer; (h) a 1994 Premier pontoon; (i) a 1994 Seadoo jet ski and trailer; (j) a mobile home trailer located at a campground in Lagro, Indiana; (k)

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<sup>1</sup> The evidence showed and the trial court found that Wife’s pension was earned entirely before the marriage.

<sup>2</sup> This percentage represents Wife’s equal share of that portion of Husband’s pension which accrued during the marriage.

all personal property currently in her possession; (l) all personal property located in the mobile home trailer; (m) all personal property acquired prior to the marriage; (n) Wife's antiques; (o) Wife's jewelry; and (p) an insurance check in the sum of \$1,000 as replacement for Wife's stolen jewelry. The trial court awarded Husband the following marital assets, subject to the indebtedness thereon: (a) real estate located in Kentucky; (b) 80.91% of his pension from General Motors; (c) his life insurance with a cash value of \$5,689.00; (d) a 1997 Dodge Ram truck; (e) a 1979 Dodge truck; (f) a 1991 speed boat; (g) a 2003 cargo trailer; (h) all personal property currently in his possession; (i) his tools; and (j) his jewelry. In dividing the marital assets, the trial court made findings as to what property was acquired before marriage and assigned values to the property based upon the evidence presented at the dissolution hearings.<sup>3</sup>

With regard to marital debts, the trial court ordered that Wife would be responsible for an equity line of credit on the marital residence due and owing to Old National Bank, certain identified medical bills, an Elder-Beerman credit card in Wife's name, an H.H. Gregg account used for the purchase of a television and sound system, and any and all other obligations in her name only. Husband was assigned marital debt consisting of the mortgage due and owing on the Kentucky property, accounts with Menards, Lampco Visa, Mastercard, and Elder-Beerman, the joint obligation due and owing to H.H. Gregg for the washer, dryer, and entertainment center in his possession, and any and all other

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<sup>3</sup> Upon appeal, no challenge is made to the values the trial court attributed to the marital assets.

obligations in his name only. Although the trial court identified the above marital debts, it did not specify the values associated with each.<sup>4</sup>

Upon appeal, Husband argues that the trial court erred in awarding Wife greater than fifty percent of the marital estate. Specifically, Husband argues that the court failed to make the necessary findings to rebut the presumption that an equal division of property was just and reasonable. According to Husband's calculations, the trial court awarded Wife marital assets with a total value of approximately \$197,241.36, while awarding him marital assets with a total value of \$117,959.00. According to Husband's calculations, this property division resulted in Wife receiving sixty-three percent of the marital estate. Wife, on the other hand, contends that the trial court's division of property was nearly even, asserting that the trial court awarded her approximately \$120,000.00 in assets and awarded Husband approximately \$110,000.00 in assets.

The division of marital assets lies within the sound discretion of the trial court, and we will reverse only for an abuse of discretion. Woods v. Woods, 788 N.E.2d 897, 900 (Ind. Ct. App. 2003). When a party challenges the trial court's division of marital property, he must overcome a strong presumption that the court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions

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<sup>4</sup> From our review of the record, values attributable to the majority of the items of marital debt are found only in Petitioner's Exhibit 1, which was admitted into evidence during the May 24, 2004 hearing. Over the course of the three dissolution hearings, the Husband and Wife disputed withdrawals made from the home equity line of credit on the marital residence, but made no challenge to the values associated with the remaining identified marital debts. In her calculation of the distribution of the marital estate, Wife used the values attributable to the marital debts found in Petitioner's Exhibit 1.

applicable to our consideration on appeal. Id. Indiana Code § 31-15-7-5 (Burns Code Ed. Repl. 2003) governs the distribution of marital property and provides as follows:

“The court shall presume that an equal division of the marital property between the parties is just and reasonable. However, this presumption may be rebutted by a party who presents relevant evidence, including evidence concerning the following factors, that an equal division would not be just and reasonable:

- (1) The contribution of each spouse to the acquisition of the property, regardless of whether the contribution was income producing.
- (2) The extent to which the property was acquired by each spouse:
  - (A) before the marriage; or
  - (B) through inheritance or gift.
- (3) The economic circumstances of each spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell in the family residence for such periods as the court considers just to the spouse having custody of any children.
- (4) The conduct of the parties during the marriage as related to the disposition or dissipation of their property.
- (5) The earnings or earning ability of the parties as related to:
  - (A) a final division of property; and
  - (B) a final determination of the property rights of the parties.”

If the trial court determines that an unequal distribution is warranted, it must set forth the basis for the deviation from the 50/50 presumptive division. Scott v. Scott, 668 N.E.2d 691, 705 (Ind. Ct. App. 1996).

Having reviewed the trial court’s findings and the evidence giving rise thereto, we agree with Husband that the trial court deviated from the 50/50 presumption and awarded Wife a greater percentage of the marital estate. However, and notwithstanding the fact that in its findings the trial court made a valiant attempt to identify and divide all of the marital assets and debts, we are unable to determine what the trial court intended on a percentage basis to be the precise final distribution. The trial court did not indicate what

it valued the total marital estate to be and did not specify in its order the amounts it attributed to the marital debts assigned to Husband and Wife respectively. The confusion created by the trial court's order is demonstrated by the fact that, upon appeal, Husband and Wife place wholly different values upon the value of the marital estate distributed to each of them. Indeed, our attempt to calculate the trial court's final distribution based upon the trial court's findings falls somewhere in between Husband's and Wife's calculations. Be that as it may, in the present case we find it unnecessary to determine the precise mathematical percentage of the distribution to Husband and Wife respectively in order to review Husband's claim upon appeal. After reviewing the record, it is clear to us that the deviation is not as great as Husband contends. Rather, after reviewing the trial court's findings and conclusions and the corresponding evidence in the record, we have determined that the deviation is closer to that claimed by Wife.<sup>5</sup> Knowing the "ball park" of the distribution, we now turn to whether the trial court adequately justified the deviation from the 50/50 presumption in favor of Wife.

In its findings of fact and conclusions of law, the trial court addressed Wife's claims that Husband was in contempt of a provisional order requiring Husband to pay two thirds of the mortgage payment on the marital residence, as well as other financial

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<sup>5</sup> We have been unable to determine how Husband arrived at the figures he set forth in his brief. While we have been able to discern how Wife arrived at the values of the marital estate which she claims the trial court awarded to her and Husband respectively, Wife failed to include the value of personal property in her calculation. We note that the difference in the value of the personal property awarded to Husband and Wife respectively was not insubstantial, with Wife receiving in excess of \$10,000 more in personal property than was awarded to Husband. Even taking into account the value of personal property, the difference in the distribution is not nearly as great as Husband claims.

obligations. Although the trial court did not find Husband in contempt, the trial court did find as follows:

“That the WIFE’S claims regarding equity line of credit, lake expenses (Largo, Indiana), and boat expenses have all been taken into account in the Court order of property division and no further order is made.” Appendix at 16.

As suggested by Wife, it is reasonable to infer that the trial court’s deviation from the 50/50 split in her favor was to accommodate for these various financial items.

We further note that the trial court attempted to justify a deviation in favor of Wife when it stated in its order the following:

“The Court in consideration of the future earning abilities of the parties, WIFE is clearly at a economic advantage. HUSBAND is placed in a better position due to the economic circumstances. In the final division of the marital property, the Court must look to the earning capabilities in division of assets and the marital pot.” Appendix at 17.

Although the trial court’s statements are, on their face, contradictory, we think in all likelihood that the court’s statement that Wife was at an “economic advantage” is a simple typographical error. From the context of the trial court’s statement and given the court’s finding that Husband was in “a better position due to the economic circumstances,” we think it is safe to assume that the trial court intended to conclude that Wife is at an “economic disadvantage.” Indeed, even Husband acknowledges in his brief that the trial court’s statement in this regard is likely the result of a typographical error. Although the trial court’s statement is not a model of clarity, the record contains evidence

which supports the trial court's determination that Wife was at an economic disadvantage.<sup>6</sup>

Having reviewed the trial court's findings of fact and conclusions of law and the evidence giving rise thereto which was presented over the course of three days of hearings, we conclude that Husband has not overcome the strong presumption that the trial court complied with and considered the appropriate statutory factors in dividing the marital estate. The trial court, although perhaps not as explicitly as Husband would have liked, adequately justified its distribution of marital estate and its award of a greater share of the marital estate to Wife.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.

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<sup>6</sup> The record reveals that although Wife was working at the time of the hearings, she was working under restrictions as a result of ongoing medical problems related to her shoulder. Wife also suffered from other ongoing medical problems.